

**FEDERAL RESERVE SYSTEM**  
**12 CFR Part 225**  
**Regulation Y; Docket No. R-1336**

**Capital Adequacy Guidelines: Treatment of Perpetual Preferred Stock Issued to the United States Treasury under the Emergency Economic Stabilization Act of 2008.**

**AGENCY:** Board of Governors of the Federal Reserve System (Board).

**ACTION:** Final rule.

**SUMMARY:** The Board is adopting a final rule to allow bank holding companies that have issued senior perpetual preferred stock to the U.S. Department of the Treasury under the capital purchase and other programs established by the Secretary of the Treasury under the Emergency Economic Stabilization Act of 2008, to include such capital instruments in tier 1 capital for purposes of the Board's risk-based and leverage capital guidelines for bank holding companies.

**DATES:** The final rule will become effective on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], 2009.

**FOR FURTHER INFORMATION CONTACT:** Norah M. Barger, Deputy Director, (202) 452-2402, or John F. Connolly, Manager, (202) 452-3621, Division of Banking Supervision and Regulation; or Kieran J. Fallon, Assistant General Counsel, (202) 452-5270, or Benjamin W. McDonough, Senior Attorney, (202) 452-2036, Legal Division; Board of Governors of the Federal Reserve System, 20th Street and Constitution Ave., NW, Washington, D.C. 20551. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), (202) 263-4869.

**SUPPLEMENTARY INFORMATION:**

On October 17, 2008, the Board issued an interim final rule (interim rule) to allow bank holding companies that issue senior perpetual preferred stock to the U.S. Department of Treasury (Treasury) under the Troubled Asset Relief Program (TARP) established by section 101 of the Emergency Economic Stabilization Act of 2008 (Senior Perpetual Preferred Stock), to include such capital instruments in tier 1 capital for purposes of the Board's risk-based and leverage capital guidelines for bank holding companies.<sup>1</sup> The Board is now adopting the interim rule as a final rule without substantive changes.<sup>2</sup>

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<sup>1</sup> 73 FR 62851 (October 22, 2008). A correction to a citation in the interim rule was published on October 27, 2008. 73 FR 63624 (October 27, 2008).

<sup>2</sup> This final rule addresses only the regulatory capital treatment of the Senior Perpetual Preferred Stock. Details about the Capital Purchase Program and other programs established by the Treasury under the EESA, including eligibility requirements and the general terms and conditions of the senior perpetual preferred stock issued to Treasury and warrants associated with such stock, are available at <http://www.financialstability.gov/>.

The Emergency Economic Stabilization Act of 2008 (EESA), Division A of Pub. L. No. 110-343, 122 Stat. 3765 (2008), was intended, among other things, “to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States.”<sup>3</sup> Pursuant to the authorities granted by the EESA, and in order to restore liquidity and stability to the financial system, on October 14, 2008, Treasury announced the establishment of the Capital Purchase Program (CPP) under the TARP.<sup>4</sup> Through the CPP, Treasury has provided capital to eligible banks, bank holding companies, savings and loan holding companies, and savings associations (collectively, banking organizations) by purchasing Senior Perpetual Preferred Stock of the banking organizations.<sup>5</sup> As of April 20, 2009, the Treasury had invested approximately \$198 billion in U.S. banking organizations through the CPP.

The Senior Perpetual Preferred Stock issued under the CPP is perpetual preferred stock in the issuing banking organization, is senior to the issuer’s common stock, and is *pari passu* with the issuer’s existing preferred shares as to liquidation preference and dividends (other than preferred shares which by their terms rank junior to the issuer’s most senior class of existing preferred shares). All Senior Perpetual Preferred Stock issued by bank holding companies provide for cumulative dividends. The aggregate amount of Senior Perpetual Preferred Stock that may be issued by a banking organization to Treasury under the CPP must be (i) not less than one percent of the organization’s risk-weighted assets, and (ii) not more than the lesser of (A) \$25 billion and (B) three percent of the organization’s risk-weighted assets.<sup>6</sup>

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<sup>3</sup> See 12 U.S.C. 5201(1).

<sup>4</sup> On November 17, 2008, the Treasury announced a term sheet under the CPP for privately-held financial institutions. On April 7, 2009, the Treasury announced term sheets for public and non-public holding companies with a top-tier parent that is organized in mutual form. These term sheets have substantially the same terms as the term sheet that was announced on October 14, 2008, for publicly-held financial institutions. For purposes of the interim rule and the final rule, the preferred stock issued to Treasury pursuant to these term sheets is considered to be senior perpetual preferred stock issued to Treasury under the TARP.

<sup>5</sup> In a separate notice being published in today’s issue of the Federal Register, the Board is publishing an interim final rule to allow bank holding companies that are “S-corporations” to include in tier 1 capital subordinated notes issued to the Treasury under the CPP for purposes of the Board’s risk-based and leverage capital guidelines for bank holding companies. [INSERT CITATION TO SUBORDINATED SECURITIES INTERIM FINAL RULE] ([INSERT DATE OF PUBLICATION OF SUBORDINATED SECURITIES INTERIM FINAL RULE]).

<sup>6</sup> Treasury has announced that it is considering re-opening the Capital Purchase Program for institutions with total assets under \$500 million and raising -- from

As noted in the preamble to the interim rule, the Senior Perpetual Preferred Stock issued under the CPP includes several features that are designed to make it attractive to a wide array of generally sound banking organizations and encourage such banking organizations to replace the Senior Perpetual Preferred with private capital in an expeditious, but prudent, manner.

In particular, the Senior Perpetual Preferred Stock issued under the CPP has an initial dividend rate of five percent per annum, which will increase to nine percent per annum five years after issuance. In addition, following the redemption of all the Senior Perpetual Preferred Stock issued under the CPP, a banking organization will have the right to repurchase any other equity security of the organization (such as warrants or equity securities acquired through the exercise of such warrants) held by Treasury.

In the preamble to the interim rule, the Board recognized that some of the features of the Senior Perpetual Preferred Stock issued under the CPP if included in preferred stock issued to private investors would render the preferred stock ineligible for tier 1 capital treatment or limit its inclusion in tier 1 capital under the Board's capital guidelines for bank holding companies. Bank holding companies generally may not include in tier 1 capital perpetual preferred stock (whether cumulative or noncumulative) that has a dividend rate step-up. Furthermore, the amount of eligible cumulative perpetual preferred stock that a bank holding company may include in its tier 1 capital generally is subject to a 25 percent limit.<sup>7</sup>

The interim rule permits bank holding companies to include all Senior Perpetual Preferred Stock issued to Treasury under the TARP in tier 1 capital without limit. The Board sought comment on all aspects of the interim rule, including this treatment. The Board has carefully reviewed and analyzed the issues raised by commenters and has decided to adopt the interim rule as a final rule without substantive changes. The Board received seven comments on the interim rule from individuals and trade groups. Commenters largely supported the interim rule.<sup>8</sup> Commenters acknowledged the Board's concerns with certain features of the Senior Perpetual Preferred Stock, including its dividend rate step-up. However, commenters noted that other factors mitigate these concerns. Commenters noted, for example, that issuers will not be allowed to repurchase other stock or increase common dividends for three years after the

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3 percent to 5 percent of risk-weighted assets -- the amount of capital instruments for which qualifying institutions can apply.

<sup>7</sup> See 12 CFR part 225, Appendix A, sections II.A.1.a.ii., II.A. a.iv.(1), II.A.1.b.i., and II.A.1.b.ii.(2). Until March 31, 2011, internationally-active banking organizations generally are expected, but not required, to limit the amount of qualifying cumulative perpetual preferred stock (including related surplus) and qualifying trust preferred securities included in tier 1 capital to 15 percent of the sum of core capital elements. 12 CFR part 225, Appendix A, section II.A.1.b.ii.(3).

<sup>8</sup> One commenter recommended that the Board take steps to make its capital adequacy guidelines easier to understand. This comment is addressed below.

issuance of the Senior Perpetual Preferred Stock. In addition, commenters argued that the dividend rate step-up of the Senior Perpetual Preferred Stock would help achieve the fundamental public policy objective of replacing the U.S. government's equity investment with private capital in a prompt, safe, and sound manner.

The Board concurs that the specific features of the Senior Perpetual Preferred Stock and the unique circumstances and purposes of the Capital Purchase Program and TARP largely mitigate the Board's concerns about the dividend rate step-up. The Senior Perpetual Preferred Stock is issued to Treasury as part of a nationwide, temporary, and emergency program, established by Treasury under the EESA, to provide capital to eligible banking organizations and thereby promote stability in the financial markets and the banking industry as a whole and help restore economic growth.

Since publication of the interim rule, the Treasury has established two additional programs under the EESA pursuant to which Treasury may purchase Senior Perpetual Preferred Stock from bank holding companies -- the Targeted Investment Program (TIP) and Capital Assistance Program (CAP). In addition, the Treasury has established the Asset Guarantee Program (AGP), under which Treasury may receive Senior Perpetual Preferred Stock from a bank holding company as a premium for guaranteeing assets of the company.<sup>9</sup>

The interim final rule adopted by the Board, by its terms, applies to all Senior Perpetual Preferred Stock issued to Treasury under the TARP, including any Senior Perpetual Preferred Stock issued under the TIP, CAP, or AGP. The Board recognizes that the Senior Perpetual Preferred Stock issued by bank holding companies to Treasury under the TIP and AGP (TIP/AGP Preferred) and under the CAP (CAP Preferred) has certain features that differ from the Senior Perpetual Preferred Stock issued under the CPP. For example, both the TIP/AGP Preferred and CAP Preferred have a higher initial interest rate, but no interest rate step-up feature. In addition, the CAP Preferred is convertible to common stock of the issuing banking organization at the organization's option (subject to the approval of the appropriate Federal banking agency), and must convert to common stock of the issuer after seven years<sup>10</sup> Although the higher initial interest rate makes the TIP/AGP Preferred and CAP Preferred somewhat less desirable from a capital perspective because of its added cost to the issuing bank holding company, the Board believes that this feature is mitigated by the lack of an interest rate step-up (in the case of both instruments) and the convertibility of the CAP Preferred.

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<sup>9</sup> Details about the TIP, CAP, and AGP are available at <http://www.financialstability.gov>.

<sup>10</sup> After conversion, the Convertible Preferred, as qualifying common stockholders' equity, would be includable without limit in the tier 1 capital of a bank holding company as a core capital element for purposes of the Board's risk-based and leverage capital guidelines for bank holding companies. See 12 CFR part 225, Appendix A, section II.A.1.a.i.

In addition, the CPP, TIP, CAP, and AGP each seek to advance the same key government objectives underlying the EESA -- fostering financial market stability, and supporting the availability of credit to consumers during the current stressed market conditions. As noted above, the EESA was adopted to “immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States.”<sup>11</sup> Treasury’s authority to make investments, and to provide commitments to make investments, under the TARP, including through the CPP and other programs, ends on December 31, 2009, subject to a potential extension to October 3, 2010.<sup>12</sup> The emergency nature and statutorily-limited duration of the TARP helps to ensure that the Senior Perpetual Preferred Stock issued by banking organizations will serve its intended purpose as a provisional vehicle for buttressing the capital bases of banking organizations and stabilizing the financial system during a period of severe economic stress, while preserving the preeminent importance of private capital to the stability of banking organizations in the longer-term.

The Board also notes that, since the adoption of the interim rule, the EESA has been amended to permit a banking organization to redeem the Senior Perpetual Preferred Stock without regard to the source of the funds used to redeem the stock and without regard to any waiting period.<sup>13</sup> The Board notes, however, that the amendment requires that Treasury consult with the appropriate Federal banking agency before a banking organization may make such a redemption.<sup>14</sup> In addition, the terms of the Senior Perpetual Preferred Stock issued under the CPP, TIP, CAP, and AGP provide that redemption is subject to the approval of the Federal Reserve, which provision remains effective.<sup>15</sup> In light of this provision, the Board recently noted

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<sup>11</sup> See *supra*, n. 3.

<sup>12</sup> See 12 U.S.C. 5230. Treasury’s authority under the TARP may be extended until October 3, 2010, only upon a written certification to the Congress by the Secretary of the Treasury. This certification must “include a justification of why the extension is necessary to assist American families and stabilize financial markets, as well as the expected cost to the taxpayers for such an extension.” *Id.*

<sup>13</sup> See section 7001 of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115 (2009). Previously, during the first three years that the Senior Perpetual Preferred Stock was outstanding, a banking organization was required to redeem the stock with cash proceeds from the banking organization’s issuance of common stock or perpetual preferred stock that (i) qualifies as tier 1 capital of the organization and (ii) the proceeds of which are no less than 25 percent of the aggregate issue price of the Senior Perpetual Preferred Stock. See 73 FR 62852 (October 22, 2008).

<sup>14</sup> See section 7001 of the ARRA.

<sup>15</sup> See 12 CFR part 225, Appendix A, section II.A.1.c.ii.(2).

in Federal Reserve SR letter 09-4<sup>16</sup> that any bank holding company that intends to redeem Senior Perpetual Preferred Stock issued to Treasury under the CPP, TIP, CAP, or AGP should first consult with Federal Reserve supervisory staff. After reviewing a request by a bank holding company to redeem Senior Perpetual Preferred Stock, the Board may take such actions as are necessary or appropriate to restrict the bank holding company from redeeming such securities if the redemption would be inconsistent with the safety and soundness of the bank holding company.<sup>17</sup>

For these reasons and in order to continue to support the strong public policy objectives of the CPP, TIP, CAP, and AGP and promote the stability of banking organizations and the financial system, the Board has adopted the interim rule in final form. The final rule -- like the interim rule -- permits bank holding companies that have issued Senior Perpetual Preferred Stock to the Treasury under the TARP to include such stock without limit as tier 1 capital for purposes of the Board's risk-based and leverage capital guidelines for bank holding companies.<sup>18</sup> The Board's decision to include Senior Perpetual Preferred Stock as an unrestricted core capital element in bank holding companies' tier 1 capital is based on each of the factors discussed above -- including the emergency and temporary nature of the legislation authorizing the acquisition of such stock by the Treasury -- as well as those presented in the interim rule, and is further supported by the commenters and the points they raised.

As noted in the preamble to the interim rule, the Board expects bank holding companies that issue Senior Perpetual Preferred Stock under the CPP, TIP, CAP, and AGP like all other bank holding companies, to hold capital commensurate with the level and nature of the risks to which they are exposed. In addition, the Board expects bank holding companies that issue Senior Perpetual Preferred Stock to appropriately incorporate the dividend features of the stock into the organization's liquidity and capital funding plans. Bank holding companies should not construe the Board's decision to allow the inclusion of the Senior Perpetual Preferred Stock as an unrestricted core capital element in bank holding companies' tier 1 capital as in any way (1) detracting from the Board's longstanding stance regarding the unacceptability of a rate step-up in other tier 1 capital instruments or (2) reflecting a decision by the Board to allow cumulative perpetual preferred stock to be includable in bank holding companies' tier 1 capital in excess of the limits established for restricted core capital elements under the Board's capital guidelines for bank holding companies.

## **Regulatory Flexibility Act**

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<sup>16</sup> SR 09-4, "Applying Supervisory Guidance and Regulations on the Payment of Dividends, Stock Redemptions, and Stock Repurchases at Bank Holding Companies," March 27, 2009.

<sup>17</sup> See 12 CFR § 225.4(b)(1); 12 CFR part 225, Appendix A, sections II.(iii) and II.A.1.c.ii.(2).

<sup>18</sup> See 12 CFR part 225, Appendices A and D.

The Regulatory Flexibility Act (RFA) requires an agency that is issuing a final rule to prepare and make available a regulatory flexibility analysis that describes the impact of the final rule on small entities.<sup>19</sup> The RFA provides that an agency is not required to prepare and publish a regulatory flexibility analysis if the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.<sup>20</sup> Under regulations issued by the Small Business Administration,<sup>21</sup> a small entity includes a bank holding company with assets of \$175 million or less (a small bank holding company). As of December 31, 2008, there were approximately 2,586 small bank holding companies.

As a general matter, the Board's risk-based and leverage capital guidelines for bank holding companies apply only to a bank holding company that has consolidated assets of \$500 million or more. Accordingly, this final rule will not affect small bank holding companies and, for this reason, the Board hereby certifies that the rule will not have a significant impact on a substantial number of small bank holding companies.

### **Paperwork Reduction Act**

In accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3506), the Board has reviewed the final rule to assess any information collections. There are no collections of information as defined by the Paperwork Reduction Act in the final rule.

### **Use of Plain Language**

Section 722 of the Gramm-Leach-Bliley Act, Pub. L. No. 106-102, requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Board invited comment on how to make the interim rule easier to understand. The Board received one comment generally criticizing the Board's capital adequacy guidelines as difficult to understand.

The Board acknowledges that the regulation of a banking organization's capital is a complex area. The Board's capital guidelines necessarily must reflect this complexity. Nevertheless, the Board has endeavored to present this final rule, like all of its capital rules, in a manner that, in light of the nature and complexity of the subject matter, is as brief, comprehensible, and straightforward as possible.

### **List of Subjects**

#### **12 CFR Part 225**

Administrative Practice and Procedure, Banks, Banking, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities.

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<sup>19</sup> 5 U.S.C. 603(a).

<sup>20</sup> 5 U.S.C. 605(b).

<sup>21</sup> See 13 CFR § 121.201.

# **BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM**

## **12 CFR Chapter II**

### **Authority and Issuance**

For the reasons stated in the preamble, the Board of Governors of the Federal Reserve System amends part 225 of chapter II of title 12 of the Code of Federal Regulations as follows:

### **PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)**

1. The authority citation for part 225 continues to read as follows:

**Authority:** 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831i, 1831p-1, 1843(c)(8), 1844(b), 1972(1), 3106, 3108, 3310, 3331-3351, 3906, 3907, and 3909; 15 U.S.C. 1681s, 1681w, 6801 and 6805.

2. In appendix A to part 225:

a. Revise section II.A.1.a.ii.; and

b. Revise footnote 8 in section II.A.1.c.ii.(2) to read as follows:

#### **APPENDIX A to PART 225 – CAPITAL ADEQUACY GUIDELINES FOR BANK HOLDING COMPANIES: RISK-BASED MEASURE**

II. \* \* \*

A. \* \* \*

1. \* \* \*

a. \* \* \*

ii. Qualifying noncumulative perpetual preferred stock, including related surplus, and senior perpetual preferred stock issued to the United States Department of the Treasury (Treasury) under the Troubled Asset Relief Program (TARP), established by the Emergency Economic Stabilization Act of 2008 (EESA), Division A of Pub. L. No. 110-343 (which for purposes of this appendix shall be considered qualifying noncumulative perpetual preferred stock), including related surplus;

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c. \* \* \*

ii. \* \* \*

(2) \* \* \*

<sup>8</sup> Notwithstanding this provision, senior perpetual preferred stock issued to the Treasury under the TARP, established by the EESA, may be included in tier 1 capital. In addition, traditional convertible perpetual preferred stock, which the holder must or can convert into a fixed number of common shares at a preset price, generally qualifies for inclusion in tier 1 capital provided all other requirements are met.

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By order of the Board of Governors of the Federal Reserve System, May 21, 2009.

Robert deV. Frierson (signed)

Robert deV. Frierson,

Deputy Secretary of the Board.